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June 1, 2015

VIA ECFS ***EX PARTE NOTICE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90

Dear Ms. Dortch,

On May 29, Angie Kronenberg and Mary Albert of COMPTEL met with Chanelle Hardy, Chief of Staff and Media Legal Advisor, and Louis Peraertz, Senior Legal Advisor - Wireless, International, and Public Safety, in Commissioner Clyburn's office to discuss COMPTEL's concerns with the pending AT&T/DIRECTV merger.

COMPTEL addressed the impact the merger would have on video programming pricing. In order to be competitive in the residential market, providers must offer a triple play of broadband, video and voice services. As the largest MVPD in the country, the merged entity will enjoy substantial savings in content acquisition costs from programmers. Programmers will seek to recover those lost revenues by increasing prices to smaller MVPDs.[1] Higher programming prices and programming price disparities will make it more difficult for smaller MVPDs to compete, including by expanding their broadband networks. As COMPTEL previously stated in its Reply Comments, video already is a loss leader for many small MVPDs.[2] Further video cost increases to them as a result of this merger, would make it even more difficult to compete head-to-head with the merged entity for broadband and video. Approximately ten percent of COMPTEL's members currently offer triple play bundles that compete directly against the triple play bundles offered by AT&T and will be directly impacted by the merger. Nonetheless, all small and mid-sized MVPDs will likely face price increases as a result of the merger.

COMPTEL supports Cox Communications' proposed condition that would restrict the merged entity from entering into programming contracts that include unreasonable

[1] *See* Reply Comments of COMPTEL, MB Docket No. 14-90, 5-6 (Jan. 7, 2015) (citing the Applicants' Application touting the benefits of the increased scale it will gain that will reduce its programming costs).

[2] *Id.* at 6.

volume discounts, as well as the American Cable Association's ("ACA") proposal that the merged entity should not be able to interfere with rates, terms, and conditions that programmers offer competitors.[3] In order to ensure that the Commission has the tools to appropriately monitor compliance with these or similar conditions, COMPTEL proposes that the merged entity be required to report quarterly on the video programming contracts it enters into or renews. The reported information should include the rates the merged entity pays for programming and a confirmation that it has not received an unreasonable discount. The merged entity should also be prohibited from enforcing "most favored nation" ("MFN") clauses against programmers.

COMPTEL also expressed concern with the potential harmful impact the merger may have on over the top video providers ("OVD"). Because OVD programming will compete with the merged entity's satellite video and U-verse programming, the merged entity will have the incentive and the ability raise its rivals' costs by charging edge providers terminating access fees to reach its broadband Internet customers.[4] It is well documented in this record that AT&T has allowed for congestion in order to extract terminating access fees from other networks and edge providers.[5] By failing to relieve congestion at interconnection ports in a timely fashion, the merged entity can degrade the viewing experience of OVD customers. It will have more reason to engage in such behavior post-merger in order to protect the MVPD revenues of DirecTV. In its *Open Internet Order*, the Commission specifically stated that it remains essential for the FCC and DOJ to carefully monitor and take action to address anti-competitive incentives in mergers and acquisitions concerning broadband Internet access service and Internet traffic exchange.[6] As such, the Commission should prohibit the merged entity from charging terminating access fees or using broadband data caps in a manner that would be detrimental to the continued development and availability of OVD programming.

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[3] *See* Petition to Condition Consent of Cox Communications Inc. MB Docket No. 14-90 at 17 (Sept. 16, 2014) ("Cox Petition"); and Comments of American Cable Association MB Docket No. 14-90, at 17-26 (Sept. 16, 2014).

[4] *See, e.g.,* Letter from Markham C. Erickson, Counsel to Netflix, Inc. (filed May 4, 2015); *see also* Letter from Robert M. Cooper, Counsel to Cogent Communications Group, Inc. (April 30, 2015).

[5] *Id.; see also* Cogent Comments, MB Docket No. 14-90, at 12-15 (Sep. 16, 2014); Netflix Comments, MB Docket No. 14-90, at 23-25 (Sep. 16, 2014); Cogent Reply Comments, MB Docket No. 14-90, 14-17 (Jan. 7, 2015); Netflix Reply Comments, MB Docket No. 14-90, 3-10 (Jan. 7, 2015).

[6] *In re Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, ¶ 203 (2015) ("*Open Internet Order*").

AT&T continues to assert that interconnection is not a concomitant part of its broadband Internet access ("BIAS") services, but rather of its separate backbone services. This is a red-herring that fortunately the Commission definitively put to rest in the *Open Internet Order*:

- "Broadband Internet access service involves the exchange of traffic between a last-mile broadband provider and connecting networks. The representation to retail customers that they will be able to reach 'all or substantially all Internet endpoints' necessarily includes the promise to make the interconnection arrangements necessary to allow that access."[7]

- "We adopt our tentative conclusion in the 2014 Open Internet NPRM that broadband Internet access service does not include . . . Internet backbone services (to the extent those services are separate from broadband Internet access service)."[8]

- "[T]he classification does not sweep in the entire Internet. It applies only to retail broadband providers' transmission of traffic on their own networks, including the necessary exchange of traffic with other networks . . . . Interconnection is simply the operation of the gate. And the classified service expressly does not include, for example, virtual private network services, content delivery networks, hosting or data storage services, or Internet backbone services."[9]

COMPTEL supports the interconnection and data cap conditions proposed by Cogent, Dish, Free Press, and Public Knowledge on May 12, 2015.[10] Those conditions, combined with the transparency requirements, will better protect consumers and OVD competition.

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[7] *Id.* ¶ 204.

[8] *Id.* ¶ 190.

[9] FCC, Opposition to Petitioners' Motion for Stay, Docket No. 15-1063 at 12 (D.C. Circuit, May 22, 2015).

[10] *See* Letter from Robert M. Cooper, Counsel to Cogent Communications, Inc., Jeffrey Blum of DISH Network Corporation, Matt Wood of Free Press, Josh Stager of New America's Open Technology Institute, and John Bergmayer of Public Knowledge, MB Docket No. 14-90, 5-6 (May 12, 2015). Contrary to AT&T's claims, the proposed conditions would not require AT&T to offer free backbone services or shift costs to AT&T's customers. *See* Letter from AT&T/DirecTV at 4 (May 26, 2015). Instead the conditions would ensure that AT&T delivers the traffic that its customers request from third party networks and edge providers without using its gatekeeper power to extract monopoly rents from the networks and edge providers.

In its Application, AT&T lauded the benefits it contends consumers will enjoy as a result of the merger in terms of enhanced competition in the provision of broadband service and bundled broadband and video packages. These are benefits that COMPTEL members also bring to their customers, often using wholesale inputs obtained from AT&T. To date, AT&T has declined to interconnect with requesting carriers on an IP-to-IP basis for the exchange of VoIP traffic. All of the efficiencies that VoIP technology may offer can be significantly diluted if the traffic reaches the interconnection point in IP but must be converted to TDM at the media gateway. The Commission should make clear that the merged entity must comply with Sections 251 and 252 of the Act both during and after the transition of AT&T's wireline network to IP and that AT&T's statutory obligations to provide unbundled network elements are not affected by the conversion from TDM to IP-based transmission technology or from copper to fiber. [11]

Finally, COMPTEL expressed its support for TIVO's request that the merged company, which will be serving 26 million video customers, be required to comply with the purpose and intent of Section 629 of the Act to promote and encourage retail device competition.[12]

Respectfully submitted,

/s/ Angie Kronenberg

cc: Chanelle Hardy
Louis Peraertz

[11] Petition To Deny of Public Knowledge and Institute For Local Self-Reliance MB Docket No. 14-90 at 11-16 (Sept. 16, 2014); Cox Petition at 21-26; Cox Reply to Opposition at 10-11 (Nov. 5, 2014); and Windstream Petition for Declaratory Ruling, WC Docket No. 15-1, GN Docket No. 13-5 (Dec. 29, 2014).

[12] Comments of TiVo MB Docket No. 14-90 filed September 16, 2014.